

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 25, 2005

STATE OF TENNESSEE v. JIMMY PAUL PROVENCIO

**Direct Appeal from the Criminal Court for Hamilton County
No. 252719 Jon Kerry Blackwood, Sitting by Designation**

No. E2005-01253-CCA-R3-CD - Filed November 18, 2005

The defendant challenges his summary adjudication of criminal contempt. Following thorough review, we conclude that the gratuitous profane language used by the defendant was sufficient to convict him; that the trial court was within its discretion in summarily adjudicating the matter; and that the trial court's failure to include the factual basis of the charge in the order, while technically incorrect, was not harmful to the defendant. Therefore, we affirm.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

Daniel J. Ripper and Meredith C. Mochel, Chattanooga, Tennessee (on appeal); and Ardena J. Garth, District Public Defender, and Hillary Stuart, Assistant Public Defender (at trial), for the appellant, Jimmy Paul Provencio.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William H. Cox, III, District Attorney General; and Neal Pinkston, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The defendant, Jimmy Paul Provencio, appeals a summary adjudication of criminal contempt that occurred during defense counsel's oral motion to withdraw in an underlying case. During the motion hearing, the defendant expressed his general dissatisfaction with counsel's representation and made oral pro se motions for a handwriting analysis, fingerprint tests, a speedy trial, and appointment of counsel. Following defense counsel's statement as to why she did not file a motion for a handwriting analysis, the defendant stated, "I'm the victim here, and I'm being screwed around, and this lady f--king pulled my chain for I don't know how long." Thereafter, the trial judge summarily

convicted him of criminal contempt and sentenced him to ten days, consecutive to any sentence he received in the pending matter. Defense counsel's motion to withdraw was ultimately granted, and new counsel was appointed. The defendant now appeals the summary adjudication of criminal contempt.

Analysis

I. Sufficiency

The defendant first contends that the trial court erred in convicting him of criminal contempt. The statute pertaining to this offense is codified at Tennessee Code Annotated section 29-9-102 and states:

The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases.

- (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice;
- (2) The willful misbehavior of any of the officers of such courts, in their official transactions;
- (3) The willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts;
- (4) Abuse of, or unlawful interference with, the process or proceedings of the court;
- (5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them; or
- (6) Any other act or omission declared a contempt by law.

Tenn. Code Ann. 29-9-102 (2002). Criminal contempt is used to “preserve the power and vindicate the dignity and authority of the law” as well as to preserve the court “as an organ of society.” Black v. Blount, 938 S.W.2d 394, 398 (Tenn. 1996). Sanctions for criminal contempt are generally designed to punish the contemnor and are both punitive and unconditional in nature. Id. If a defendant is charged with criminal contempt, guilt must be established by proof beyond a reasonable doubt. Id.

In the present case, the following exchange took place during the proceedings on defense counsel's oral motion to withdraw:

[Defense Counsel]: Your Honor, under the circumstances of the Court and the fact he has a co-defendant, his trial is currently set for March the 1st, which was the absolute first opportunity the Court could assign that trial. He has all the discovery that's been provided for me by the State, and as the Court is aware, there

is a standing discovery order. So I have full discovery and I've provided it to [the defendant].
 As far as the fingerprint analysis and the handwriting analysis, I am not going to file those motions.

[Trial Court]: Do you have any evidence to present, sir, that there might be fingerprints that might be obtained from this check?

[Defendant]: On the check from the person that gave it to me, yes.

[Trial Court]: Do you show whether or not there's been any fingerprints that have been lifted to be compared?

[Defendant]: I haven't been able to get any. This is part of my request for evidence.

[Trial Court]: All of that will be denied. And if the Court goes ahead and continues in this posture, your motion for speedy trial will be denied. And the Court's going to allow the –

[Defendant]: Handwriting analysis?

[Trial Court]: We're not going to allow any of it with just unsworn motions.

[Counsel]: If handwriting was an element of the crime, if it was a requirement of the State to show that it was actually [the defendant] who wrote the check, I would absolutely demand a handwriting analysis. But at this time I'm not going to file that motion.

[Defendant]: I'm the victim here, and I'm being screwed around, and this lady f--king pulled my chain for I don't know how long.

[Trial Court]: All right, sir. You're in contempt of this Court, and whatever sentence you're going to get, you're going to add ten days. Don't you ever say anything like that in this court again.

The transcript presented sufficient evidence to convict the defendant of criminal contempt under subsection (1) of the statute, as his willful misbehavior risked obstruction of the administration of justice. The defendant's gratuitous use of profane language is the willful misbehavior that is contemptible. Court proceedings are to be conducted in a civil and dignified manner, and when one strays from that course, their conduct risks obstructing the administration of justice.

II. Summary Adjudication

Criminal contempt may be adjudicated summarily if the judge certifies that he or she saw or heard the conduct and that it was committed in the presence of the court or by judgment after notice and a hearing. Tenn. R. Crim. P. 42. On appeal, the defendant contends that the trial court erred in summarily adjudicating his contempt charge because such action should only be taken in the most exceptional of circumstances. See State v. Turner, 914 S.W.2d 951, 957 (Tenn. Crim. App. 1996).

In Turner, this court initially noted that because summary adjudication represents marked departure from the traditional notions of due process, such procedure “should be used sparingly, and

even then only in cases of ‘exceptional circumstances.’” Turner, 914 S.W.2d at 957 (citations omitted). However, Turner ultimately left the determination of what constitutes an exceptional circumstance to the discretion of the trial court, while issuing the following guidance:

[C]ourts exercising summary contempt power must consider, in addition to the facial requirements of Rule 42(a), the nature of the conduct, its effect, if any, on the administration of justice, and the overall purpose of Rule 42(a) proceedings. Acts of willful disobedience or disrespectful conduct, by their nature, pose the risk of obstructing the administration of justice.

Id. at 958.

Initially we note that the facial requirements for summary adjudication were met, as the record demonstrates that the trial judge heard the defendant’s statement and that the statement was made in the presence of the court. Moreover, we agree that the defendant’s profane language amounted to disrespectful conduct, which could properly be determined by the trial court to constitute an exceptional circumstance. Therefore, upon review, we conclude that the trial court did not err in summarily adjudicating the defendant’s charge of criminal contempt.

III. Recitation of the Facts Under Tennessee Rule of Criminal Procedure 42(a)

In his final issue, the defendant contends that the trial court did not properly enter an order of contempt citing the facts underlying the contempt charge, as is mandated by Tennessee Rule of Criminal Procedure 42(a). Specifically, the Rule states that:

A criminal contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(emphasis added). In conducting our analysis, we turn to an earlier opinion of this court, which squarely addresses the issue at hand, and is instructive in this appeal:

The state does not argue that this skeletal order complies with the prerequisites for summary criminal contempt proceedings under Rule 42(a), and we are unprepared to so hold. The order fails to address whether the judge saw or heard the conduct constituting contempt and whether such took place in the court’s presence. See Tenn. R. Crim. P. 42(a). Moreover, the order fails to address its factual basis. See id. Thus, the general sessions court’s order is deficient under Rule 42(a).

That said, however, we are not compelled to dismiss the proceedings altogether, as the defendant would have us do. A court which fails to follow the requisites of Rule 42(a) relative to the contents of its order holding an individual in contempt risks having its contempt finding dismissed on the basis of insufficient evidence to support the conviction. See Varley v. Varley, 934 S.W.2d 659, 664 (Tenn. Ct. App. 1996) (record did not specify conduct upon which contempt was based and judge did not certify that he saw or heard the offending conduct). However, the record in the case at bar contains Judge Walton’s oral statements at the general sessions court hearing

in which he found the defendant's actions to be the contemptuous conduct and certified that it was committed in his presence. The deficiency is that this was omitted from the written order. Although the better and correct practice would be for this information to be included in the order as required by Rule 42(a), the defendant has not proven that he was harmed by the technical deficiency, especially in view of the de novo appeal and circuit court judgment which followed.

State v. Charles Johnston, No. E2002-02028-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 1139, at *13-14 (Tenn. Crim. App., at Knoxville, Dec. 30, 2003). As in Johnston, the record in the instant case reflects that the judgment did not include either the factual basis of the charge or whether or not the contemptuous statement was made in the court's presence. However, the transcript of the oral motion to withdraw conclusively establishes that the trial judge heard the statement and that it was made in the court's presence. As was noted in Johnston, the preferred practice is certainly to include the requisite factual detail in the order; however, because the defendant has failed to show that he was harmed by the technical omission, we affirm the judgment of the trial court.

Conclusion

Based upon the foregoing reasoning, the defendant's conviction for criminal contempt is affirmed.

JOHN EVERETT WILLIAMS, JUDGE